IN THE

Supreme Court of the United States

October Term, 1947.

Nos. ~~59 and~~ 79.

UNITED STATES OF AMERICA,
Appellant,

AGAINST

PARAMOUNT PICTURES, INC. *et al.*,
Appellees.

PARAMOUNT PICTURES, INC. *et al.*,
Appellants,

AGAINST

UNITED STATES OF AMERICA,
Appellee.

ON APPEALS FROM UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Motion for Leave to File Brief as Amicus Curiae and Brief in Support Thereof.

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Appellees.

PARAMOUNT PICTURES, INC. *et al.*,

Appellants,

AGAINST

UNITED STATES OF AMERICA,

Appellee.

ON APPEALS FROM UNITED STAT. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Motion for Leave to File Brief as Amicus Curiae.

May It please the Court:

The undersigned as counsel for the American Civil Liberties Union respectfully move this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae.* The consent of the Solicitor General to the filing of this brief has been obtained. Counsel for appellees-appellants have failed to give their consent.

Copies of the accompanying brief, together with this motion have been served upon all parties.

Special reasons in support of this motion are set out in the accompanying brief.

HAROLD J. SHERMAN and
H. WILLIAM FITELSON,
Counsel, American Civil Liberties Union, Amicus Curiae.

January 19, 1948.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

Nos. 50 and 79.

UNITED STATES OF AMERICA,

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PARAMOUNT PICTURES, INC. *et al.*,

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UNITED STATES OF AMERICA,

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ON APPEALS FROM UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief of American Civil Liberties Union, Amicus Curiae.

Statement.

Plaintiff, United States of America, appeals from so much of the decree of a statutory three-judge court convened in the Southern District of New York, as denies such plaintiff's prayer for divestiture of the ownership interests of the five major defendants, Paramount, Loew's, RKO, Warner, and Fox, in motion picture theatres throughout the United States. Defendants cross-appeal from all

other parts of such decree which grant injunctive and certain other relief to plaintiff.

The gravamen of the complaint is that defendants have established an unlawful monopoly in the field of production, distribution, and exhibition of motion pictures to the detriment of the public interests. As indicated in plaintiff's charge, and as established by the evidence, the closely inter-related factors largely responsible for such usurpation by defendants of monopolistic control over substantially the entire motion picture industry, are basically two. These are:

1. The acquisition and operation by five of such major defendants of the finest and the largest first-run motion picture theatres strategically located in the key cities and metropolitan areas of the United States, and

2. Certain illegal and discriminatory trade practices by all defendants which have unquestionably frustrated, limited, and even destroyed competition, with the concomitant impairment of the rights of the movie-going public to enjoy the benefits of the widest possible diversity in the production and the exhibition of motion pictures.

The American Civil Liberties Union is a non-partisan and non-sectarian organization with a membership of thousands of persons in the United States. For the past twenty-five years it has striven to effectuate its object as expressed in its charter—to wit: "to maintain throughout the United States and its possessions the rights of free speech, free press, free assemblage, and other civil rights, and to take legitimate action in furtherance of such purposes".

The issues of this case, concerning as they do so extraordinary a medium of communications, are of para-

mount social importance and vitally affect the general public. At stake in the final resolution of these issues by this Tribunal is nothing less than the foremost constitutional freedom of the people to see and hear, at a fair price of admission, timely talking motion pictures of their own selection from a reasonably diversified supply.

POINT I.

The liberties and rights of the General Public to enjoy the benefits of maximum diversification in the production and the exhibition of motion pictures are guaranteed by the First Amendment.

The motion picture of today is a first-line dynamic conduit of thought on a par with the press and the radio. It is in some respects far more striking in its power of stimulating and captivating the human imagination and mind than any book-literature, the daily press, and the radio. Its predominantly visual character endows its moving and expressive language of imagery with the quality of universality. And its wonderful, magical, continuous telescoping of images and ideas in rapid motion, whether imparting entertainment or a serious message concerning the morals, the social mores, and the institutions of our times, renders it peculiarly capable of exerting an impressionable force on its viewers. So powerfully magnetic is its appeal that its patrons in the United States now number more than 95,000,000, in terms of weekly paid admissions, at motion picture theatres.[1]

It is through the medium of motion pictures that many millions of people are given social, economic, and political

1. The Film Daily Year Book for 1945, page 47; Radio-Movies-Press, a brochure on the American Communicative Networks by Norman Woelfel of Bureau of Educational Research of Ohio State University, 1946, page 9.

notions. Such notions may be good or bad. They may be accurate or inaccurate. They may tend to inspire the people to attain a higher or lower level of culture. In short, motion pictures are vitally important factors in shaping the emotional habits, the intellectual knowledge, the artistic taste, the social mores, and the morals of the public, as well as their convictions on current questions in the community, the state, the nation, and the world.

Thus, as is recognized in "The Annals of the American Academy of Political and Social Science" ("The Motion Picture in Its Economic and Social Aspects"), November, 1926 issue, Vol. 128, No. 217, p. 66:

> "The production of the cinema has greatly contributed to that which in its accumulative influence is the most priceless of all human possessions—knowledge. As an educator it is catering daily to the intelligence of millions. Unparalleled in their power to almost spontaneously flash before the entire civilized world the happenings, opinions, events of great magnitude, appeals, indeed of all things that are of interest to mankind, stand two recently developed agents: the cinema through the eye, the radio through the ear. • • •
>
> "The importance of the cinema in the social, economic and intellectual life of the world can scarcely be realized."

Thus, in their comprehensive report to the United States Senate[2] on their investigation of monopolistic conditions prevailing in the motion picture industry, Evans and Bertrand say:

> "• • • the motion picture industry commenced as a novel and pleasing type of entertainment, but

2. The Motion Picture Industry: A Pattern of Control, T.N.E.C. Monograph 43, p. 56.

it has evolved into an important social and cultural force.[3] In some sense, it provides a common denominator to the feelings and aspirations of an entire people. Its importance must then be measured in terms other than the conventional ones of dollars and cents."

To allow the Five Theatre-Owning Majors[4] and the Little Three[5] to exercise dominion by means of their concentrated economic powers over such a powerful social instrumentality is to seriously damage our democratic institutions. Our fundamental interests and reasons for reasonably freeing it of the restraint now firmly gripping it are precisely identical with those[6] for maintaining the

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3. The social and cultural value of motion pictures as an instrumentality of communications is also emphasized by Zechariah Chafee, Jr., Professor of Law at Harvard University, in his treatise "Free Speech in the United States" (1942 Ed., p. 547), and by Norman Woelfel of the Bureau of Educational Research of Ohio State University, in his exposition on the American Communicative Networks entitled "Radio-Movies-Press", published in 1946, pp. 2-3, 7-9, 13.

4. Paramount, Loew's, RKO, Warner and Fox.

5. Columbia, United Artists and Universal.

6. Particularly apposite is the illuminating statement on the desirability and wholesale power of free trade and ideas of Mr. Justice Oliver Wendell Holmes, appearing in his dissenting opinion reported in *Abrams et al. v. U. S.*, 250 U. S. 616, 630. Mr. Justice Louis D. Brandeis concurred in such statement and there appears to be no disagreement with it on the part of the majority justices. Vide *Cantwell et al.* v. *State of Connecticut*, 310 U. S. 296, 310, and *Thornhill* v. *State of Alabama*, 310 U. S. 88, 95, where the doctrine of civil liberties under the First Amendment is expounded.

freedom of the other two important media of communications, the press and the radio.

But, as is demonstrated by the proofs in the record, the Big Five, through their monopoly ownership in the finest, the largest, and the strategically situated first-run motion picture theatres of the United States, and the illegal, discriminatory and monopolistic trade practices furthered by them in concert with the Little Three, have effectively frustrated and even destroyed competition of ideas in the production and the exhibiting of motion pictures. In consequence of this, the general public has been deprived of its rights of selectivity. Thus the Eight Monopolistic Film Majors have, in effect, established an economic dictatorship over *one of the world's three greatest media for the dissemination of ideas and materials of persuasion and public opinion.* These defendants stifle the freedom of expression of diverse minds which wish to produce and exhibit motion pictures designed to be most responsive to the real needs and tastes of the general public. These defendants, in effect, have usurped and exercised powers of censorship over the vital stuff which the minds of the general public absorb. They have arrogated to themselves exclusively the power of determining *what* movie patrons shall see and hear. They have even presumed to fix arbitrarily the occasions *when*, if at all, their own motion pictures might be shown in unaffiliated motion picture theatres in different areas.

If our fundamental guarantees of free speech, free assemblage, and free press, under the First Amendment, could not be invoked to arrest such control over so basic a medium of communications as motion pictures, then, indeed, it will not be long before they may become illusory.

Presumably mindful of the continual evolutionary character and advent of new communicative media and the social importance of their uses, Mr. Chief Justice Hughes in *Lovell* v. *City of Griffin*, 303 U. S. 444, 452 said:

* * * * *

"* * * The liberty of the press is not confined to newspapers and periodicals. * * * *The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.*" (Emphasis ours.)

And Professor Zechariah Chafee, Jr.,[7] in his treatise "Free Speech in the United States" (1942 Ed.) pointed out:

"* * * (P. 534) All the objections to a press censorship apply as well to film censorship, especially in an age when more persons probably go to the movies than read books."

It is significant that, as early as 1915, in the very first anti-trust case brought by the Government to break the patents monopoly in the motion picture industry,[8] the United States District Court of Eastern Pennsylvania stressed the fundamental constitutional civil-liberties basis of the Sherman Act. Said the Court (P. 802):

* * * * *

"* * * The beginnings of this controversy are found in the age-long struggle 'to secure the blessings of liberty', to obtain which is stated to be one of the objects of our Constitution. There is deep-grained in human nature the impulse to influence, and, so far as it can be done, control, the actions of others. It is too much to expect that this con-

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7. The author is Professor of Law at Harvard University. At page 545 of his treatise he stresses the flexible character of the Constitutional terms "liberty" and "freedom of speech" as being such as to embrace "new media for the communication of ideas and facts".

8. *U. S. v. Motion Picture Patents Co. et al.*, 225 Fed. 800, 802 (1915); appeal dismissed in 247 U. S. 524.

trol, when secured, will always be exerted for altruistic ends. Out of this condition has arisen the need of a power of government to check the restraints which the strong would otherwise impose upon those whom they could control. * * *

"* * * The particular phase of liberty with which this law concerns itself is the freedom or free flow of commerce. * * * It secures this 'blessing of liberty' to all by making it unlawful for any to conspire to bring about 'restraint of trade or commerce'. This is the genesis and motive of the act of July 2, 1890."

The views concerning radio, as expressed by Mr. Justice Murphy[9] of this Tribunal, just 28 years later, are equally pertinent to motion pictures. Paraphrasingly and analogously quoted these are:

"Although radio broadcasting [the motion picture], like the press, is generally conducted on a commercial basis, it is not an ordinary business activity, like the selling of securities or the marketing of electrical power. In the dissemination of information and opinion, radio [the motion picture] has assumed a position of commanding importance rivalling the press and the pulpit. * * * because of its vast potentialities as a medium of communication, discussion and propaganda, the character and extent of control that should be exercised over it by the Government is a matter of deep and vital concern." (Bracketed insertions supplied.)

9. Part of the dissenting opinion of Mr. Justice Murphy in *National Broadcasting Co.* v. *U. S.*, 319 U. S. 190, 228. With this particular observation there was no disagreement on the part of the majority of this Court.

And emphatically apropos of the motion picture as a medium of communications is the juristic philosophy of Circuit Court Judge Learned Hand, as promulgated in 1943 with reference to the daily press in *U. S.* v. *Associated Press et al.*, 52 Fed. Supp. 362, 372, aff'd in 326 U. S. 1:

* * * * *

> "* * * However, neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from *as many different sources*, and with *as many different facets and colors* as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." (Italics supplied.)

In an opinion concurring[16] in the affirmance by this Court of the decision and decree of Circuit Court Judge Hand, Mr. Justice Frankfurter condemned as the worst evil in the Associated Press monopoly, the exercise of censorship powers by private enterprise over so important an instrumentality of communications as the press in the following language (PP. 28-29):

* * * * *

> "* * * But the freedom of enterprise protected by the Sherman Law necessarily has different aspects in relation to the press than in the case of

16. 326 U. S. 1, 28-29.

ordinary commercial pursuits. The interest of the public is to have the flow of news not trammeled by the combined self-interest of those who enjoy a unique constitutional position precisely because of the public dependence on a free press. *A public interest so essential to the vitality of our democratic government may be defeated by private restraints no less than by public censorship.*" (Emphasis ours.)

In terms of the modern instrumentalities of communications such as the radio, the daily press, and the motion picture, the constitutionally guaranteed rights of free speech and free press must be viewed as being dual in character. Obviously, they relate not merely to the primary freedom of the speaker, the writer, or the pictorial artist. They also refer implicitly, but nonetheless very definitely, to the correlative liberty of the listener, the reader, and the viewer—the ultimate consumer of ideas, opinions and propaganda.

The duality of the character of such constitutional rights has been pointedly recognized in *Martin* v. *City of Struthers*, 319 U. S. 141, 143. In that case, this Court declared as invalid a municipal ordinance which purported to outlaw the ringing of doorbells as an incident of distributing religious literature to the general public. In the course of his opinion, Mr. Justice Black pronounced succinctly (P. 143):

* * * * *

"The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful

> ignorance. This freedom embraces the right to distribute literature, *Lovell* v. *Griffin*, 303 U. S. 444, 452, 82 L. Ed. 949, 954, 59 S. Ct. 666, and *necessarily protects the right to receive it.*" (Italics supplied.)

This constitutional freedom of every individual to *receive* communications is the most important of all his freedoms. Comprehended in it, of course, is his undeniable and inalienable right to education in every sphere of ideas and the full enjoyment of all his faculties.[11]

To the extent that the arbitrary censorial monopolistic economic power wielded by the "Big Eight" infringes upon the Constitutional freedom of expression of independents in the production and the selection of motion pictures, it at the same time encroaches upon the vitally important Constitutional rights of the general public to see and receive ideas in motion pictures of its choice.[12]

Generally speaking, the message of the motion picture can reach the public only in theatres. Because of the huge monetary investment required for their construction and

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11. *Meyer* v. *State of Nebraska*, 262 U. S. 390, 399-400; *Grosjean* v. *American Press Co., et al.*, 297 U. S. 233, 244, 250.

12. Indeed, such constitutional rights of the general public serve to emphasize strongly the "public interest" aspects of the Sherman Act, controlling the decisions in several recent motion picture monopoly cases. *William Goldman Theatres, Inc.* v. *Loew's Inc. et al.*, 150 Fed. 2d, 738, 743 (August 2, 1945, C. C. A. 3rd) rehearing denied September 21, 1945; *U. S.* v. *Schine Chain Theatres Inc. et al.*, 63 Fed. Supp. 229, 241 (1945, Dist. Ct. W. D. N. Y.) appeal dismissed in 329 U. S. 686, rehearing granted in 329 U. S. 817-818; *Paramount Famous Lasky Corp. et al.* v. *U. S.*, 282 U. S. 30, 42; *White Bear Theatre Corp.* v. *State Theatre Corp. et al.*, 129 Fed. 2d 600-605 (1942, C. C. A. 8th).

maintenance, motion picture theatres are limited in number. In various areas of the country there are no more than one or two theatres for the simple reason that the patronage of such areas can support no more. If a producer releases for theatrical exhibition a feature motion picture whose dramatic story tends to sustain the thesis that under certain circumstances of late American frontier history, lynching was justifiable or excusable,[13] it would probably take many weeks or months and an expenditure of from $500,000 to $1,000,000 or more before another film dramatically presenting the other side of that question could be made and put on the theatrical market. And, even under the most ideal competitive conditions, such film would of necessity have to await its regular turn for some reasonable time before any available theatre, which books in advance its movie fare, exhibited it. By reasons of such factors peculiar to the motion picture industry, *it is not quite possible to present to the general public controversial films embodying all conceivable diverse points of view at one and the same time, or, in sequence, at reasonable intervals apart.*

The radio, even with its own peculiar physical limitations in the number of wave lengths available for broadcasting purposes, is a medium which leads directly into the homes of the people substantially everywhere. Many different ideas and opinions can be quickly transmitted through it at reasonably short intervals on any one day or during any single hour. The cost of each broadcast is far less than that required for the production and the exhibition of a motion picture.

The greatest advantage which the daily press enjoys is its ability to present multifarious thoughts and atti-

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13. Such a motion picture, under the title "The Virginian", starring Joel McCrea, Brian Donlevy, Barbara Britton and Sonny Tufts, was produced, released for exhibition, and distributed by Paramount Pictures, Inc. in 1946.

tudes simultaneously and even side by side. In this respect it is not hampered by any of the difficulties inherent in the radio and the motion picture.

As hereinafter demonstrated,[14] the aforementioned "natural" handicaps of the motion picture are multiplied and worsened more than a thousand times by the various artificial impediments to the free flow of intellectual and artistic communications which characterize the pattern of monopolistic control in the motion picture industry. It is precisely against the evils of this condition—*i. e.*, restrictions on the freedom of reasonable diversity of expression of ideas and thoughts in motion pictures—*that the rights of the general public must be accorded realistic and permanent protection under the First Amendment.*

POINT II.

Defendants' monopolistic combination and control over the largest and the finest theatres in various strategic centres of the United States and their predatory trade practices constitute an illegal and detrimental interference with the constitutional liberties and rights of the general public.

The huge multi-million dollar motion picture industry[15] rests principally upon a tight monopolistic control directly and indirectly over our nation's motion picture theatres. To be sure, the five major defendants, Paramount, Loew's, RKO, Fox, and Warner's, own only approximately 3,137 theatres—about 17.35%—of an aggregate of 18,076 theatres operating throughout the United States. But these 3,137 theatres embrace the largest and the finest in the country.

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14. Vide, pp. 13 to 22, *infra*, of this brief.

15. Money Behind the Screen—an analytical report on film finance published by the Farleigh Press, 1937, P. 63.

They also include 71% of the first-run theatres strategically located in the various important metropolitan centres of the United States. Although they represent 25% of the aggregate seating capacity of 11,700,000 for all theatres in America, *they yield at least 45% of the entire country's box office receipts.* In this connection it is significant to note that *such five major defendants collectively receive as film distributors more than 70% of the total film rental derived from first run theatres in the United States.*[15a]

The qualitative significance of the Big Five's affiliated theatres derives chiefly from their unusual size, unique physical quality, and strategic location. Whereas the average seating capacity for all theatres in the nation is 620, the average affiliated theatre, it is estimated, seats about 1,000. Indeed, such affiliated theatres as are in the category of de luxe metropolitan theatres run up an average in excess of 1,400 seats. Not only are such theatres the largest, but they are the most elegant in their physical appointments. And what is of very considerable importance, they are strategically established so as to render easy the exercise of dominion over the various thickly populated urban centres throughout the United States. Out of 92 American cities with populations exceeding 100,000, *73 of them, by virtue of such dominion over such first-run theatres exclusively, yield to the Theatre-Owning Big Five more than half of the nation's box office receipts.* And in all cities of 1,000,000 or more in population *the Big Five are the proprietors of the more lucrative neighborhood motion picture houses.*

Moreover, in the final analysis, the most important fact of all is that such affiliated theatres exhibit almost

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[15a] Source: Defendants' answers to Interrogatory No. 3, 1945. Exhibits: 95—R.K.O.; 40—Fox; 125—Warners; 81—Paramount; 56—Loew's; 138—Columbia; 144—United Artists; 362—Universal; and Exhibits F-21, F-21-A, 425, 467, 468, 469; 93—RKO; 43—Fox; 125a—Warner; 83—Paramount.

entirely the movie fare consisting of films produced and distributed by the Big Five and their satellites, the Little Three.[16] This fact assumes strong significance when it is realized that the Big Eight control 70% of all motion pictures and 95% of the so-called quality films,[17] and 100% of the news films.

The business policy of these monopolists is designed so as substantially to exclude the independent producers' films from such affiliated theatres. The occasions when they permit the showing in their theatres of an independent's motion picture are conspicuously rare. And, what is more, the substantial exclusion of independents from the affiliated theatres automatically operates to discourage and effectively bar them from the rest of the theatrical exhibition markets.[18] For no independent would risk his personal resources in the making of motion pictures unless he had assured access to the affiliated theatres which produce *at least 45%* of the entire country's box office receipts *and more than 70% of our national first run theatre box-office receipts.*[18a] Nor would any bank, as a rule,

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16. Universal, Columbia, and United Artists. Of these three satellites, United Artists Corporation is solely in the business of distributing films produced by its own stockholders and, on very rare occasions, by an independent.

17. In Hollywood parlance, the term "quality film" is generally used to denote a motion picture whose production cost is in the neighborhood of $500,000 or more. It is not necessarily indicative of dramatic, artistic, and cultural excellence.

18. Bertrand and Evans in their investigatory report to the U. S. Senate pointedly comment: "* * * the control of the more important exhibition outlets by the producer-distributors is probably a more important factor in limiting the entrance of new producers of quality pictures into the market than is block booking." T.N.E.C. Monograph 43 P. 25, "The Motion Picture Industry—A Pattern of Control."

18a. Source: Vide footnote 15-a, p. 14, *supra.*

undertake to finance his productions without some commitment or guarantee by the majors to distribute and exhibit them in their affiliated theatres.

The immediate effect of this monopolistic control of our largest and finest first-run theatres is to deny to the general public their constitutionally guaranteed rights to reasonable diversity in the production and the exhibition of motion pictures and freedom of selectivity. The general public, who contribute every single dollar of the overwhelming majority of our national first-run theatre box office receipts—as high as 70%—and at least 45% of the national box office receipts generally—directly to the theatre-owning defendants, have a vital interest in seeing and hearing, without artificial barriers of any kind, as many competitively produced films as possible. Only in that way can they enjoy the full benefits from the diversified artistic and cultural ideas and messages presented in such films. They should not be restricted, as they are now, to the movie fare of the Eight Majors. Such movie fare, generally speaking, is not responsive to the real tastes and desires of the general public, nor, for that matter, to their needs for the furtherance of their moral, intellectual and esthetic development.[19]

The deleterious character of the theatre-ownership monopoly of the Majors is substantially aggravated in another important respect. Invariably, the Majors prolong the exhibition of their films in affiliated first-run theatres as long as possible—frequently for many weeks or

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19. An interesting critical article on the movie fare of the Majors entitled Hollywood's Terror Films, by Siegfried Kracauer, is contained in the August, 1946 issue of COMMENTARY, Vol. 2, No. 2, pp. 132-136. In discussing the serious question, "Do They Reflect the American State of Mind?"—the author, who is a member of the staff of the Museum of Modern Art Film Library, states: "Films saturated with terror and sadism have issued from Hollywood in such numbers recently as to become commonplace."

months. They do this for two principal reasons. The first is that in this way they can skim off for themselves the cream of the box office potentialities of each film. This is accomplished simply by compelling millions of movie-goers interested in seeing and hearing the newest and most timely talking pictures to pay the exorbitantly high prices of admission to affiliated theatres. The second reason is that the Majors, in furtherance of their monopoly in the distribution of films, use their affiliated theatres as show windows for their film wares. Long exhibition runs simultaneously in various key affiliated theatres, together with customarily lavish and sustained publicity campaigns, have been found to be effective devices for injecting "prestige value" in even inferior films of the Majors so as to attract unsuspecting unaffiliated exhibitors and many, many thousands of movie-goers. Obviously, the longer the exhibition run of any film at any theatre, the shorter or more limited does the available screen time for the showing of other motion pictures become.

As a result of this artificially created bottleneck in affiliated first-run theatres, there is constantly accumulating a backlog of finished films on the shelves of the Majors and their public exhibition is delayed many months, a year or two or even longer. Translated into terms of injurious consequences to the general public, this means that they are denied their constitutional freedom of opportunity to see and to hear the newest motion pictures as promptly as is reasonably possible after their completion. It also means that they are precluded from enjoying the immediate benefits of the esthetic and cultural contributions, if any, of the various writers, actors, directors, cameramen and other screen technicians whose composite labors are impressed in each film.

But what considerably worsens all the more the evils of such theatre-ownership monopoly of the Majors are the predatory trade practices which grip firmly all branches

of the motion picture industry in a stranglehold. Several of the salient illegal trade practices imposed and maintained by the concerted acts of such Majors are these: (1) fixing of minimum admission prices to various motion picture theatres affiliated and unaffiliated; (2) coercive block booking of motion pictures; (3) blind selling of motion pictures; (4) forced selling of newsreels, travelogues and other short subjects; (5) unreasonable clearance; and (6) unfair discrimination in favor of large circuits of theatres, affiliated and unaffiliated. Sufficient descriptions and illustrations of these monopolistic activities are contained in the record and in the opinion of the court below.[20] Manifestly, then, any delineation of such evils would serve no useful purpose within the scope of this brief.

These discriminatory and various other unfair trade practices are complements of the monopoly maintained by the Majors horizontally and vertically, throughout the motion picture industry. By them many vestiges of free competition have been eliminated from the market place. And it is with their aid that defendants have arrogated to themselves dangerous censorial powers over what moviegoers of America, estimated at more than 95,000,000 paid admissions per week,[21] shall see and hear.

Let us suppose the Big Eight acquired and maintained the same stifling discriminatory monopolistic control over our radio broadcasting and reception facilities so that no one could hear and enjoy radio programs except in certain strategically situated affiliated stores for indefinitely long periods, and thereafter in designated local neighbor-

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20. 66 Fed. Supp. 323, 334-352.

21. The Film Daily Year Book for 1945, page 47; Radio-Movies-Press, a brochure on the American Communicative Networks by Norman Woelfel of Bureau of Educational Research of Ohio State University, page 9.

hood places. Certainly in that situation the frustration of the constitutional liberties of the general public to receive and enjoy at their convenience timely and variegated radio communications, would be undeniable. This conclusion would be inescapable particularly in view of what this tribunal said in *National Broadcasting Co. Inc. et al.* v. *U. S. et al.*, 319 U. S. 190, 216:

> "The 'public interest' to be served under the Communications Act is thus the interest of the listening public in 'the larger and more effective use of radio', * * *. 'An important element of public interest and convenience affecting the issue of the license is *the ability* of the licensee to render the *best practical service to the community* reached by his broadcast." (Italics ours.)

If the Big Eight transposed their discriminatory monopolistic stranglehold on films and theatres to the sphere of the press, and if, as a consequence, one could not buy a newspaper except from distantly located affiliated newsstands during preempted periods of indefinite duration, and subsequently from certain local neighborhood newspaper vendors, the public evils would be substantially identical with those in the hypothetical radio situation, and would be just as condemnable. In this connection it should be noted that even in the *Associated Press* case,[22] the public in various areas had access to at least a single paper featuring Associated Press service, and in addition to other papers with competitive news services in such areas. It was also possible for readers to have Associated Press newspapers mailed to them. Yet, the monopolistic practices of Associated Press were judicially declared invalid and prohibited because they restricted diversity and se-

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22. *U. S.* v. *Associated Press et al.*, 52 Fed. Supp. 362 (1943, D. C. S. D. N. Y.) aff'd in 326 U. S. 1.

lectivity in communications on which "we have staked * * * our all".[23]

But the public evils stemming from the unwholesome conditions in the motion picture industry are far more serious. This is so principally because motion pictures are capable of more subtle and persuasive influences on the mind and the imagination than either the radio or the press.[24]

The pivotal issue of importance in this case concerns the constitutional freedom of the population in any small community, as well as of the public in the large metropolitan centers, to see and to hear at their convenience the more recent and reasonably diversified films as early as possible after general release. There can be no valid reason why those living, say, in the Borough of Richmond, or The Bronx, in New York City, should be compelled to travel distances to the Great White Way in Manhattan to see a first-run exhibition of a film at the Roxy Theatre, owned by defendant Fox, or at the Capitol Theatre, controlled by the defendant Loew's. They should be just as free to see, hear, and enjoy the very same film in their local neighborhood theatres at a reasonably prompt time after its general release as they are to go to their neighborhood newsstands for the latest newspapers or book stores for the most timely books.

The question of the unimpeded flow of films to the small community was directly involved in the recent case

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23. Opinion of Circuit Court of Appeals Judge Learned Hand in *U. S. v. Associated Press et al.*, 52 Fed. Supp. 362, 372 (1943, D. C. S. D. N. Y.) aff'd in 326 U. S. 1.

24. For discussion of social importance of the motion picture as a medium of communications, see pages 2 to 5, *supra*. In this connection see also comments of Mr. Norman Woelfel of Bureau of Educational Research of Ohio State University in brochure entitled "Radio-Movies-Press", at page 9.

of *White Bear Theatre Corporation* v. *State Theatre Corporation et al.*, 129 Fed. 2d, 600, 604-605 (1942 C. C. A., 8th). There plaintiff charged defendants with conspiring and attempting to obtain a monopoly upon all procurable first-run feature films for a certain local community for the purpose of driving plaintiff, a competing exhibitor, out of business. Said the Court (PP. 604-605):

"* * * The result of the conspiracy and attempted monopoly, in addition to the injury to plaintiff, was *to deprive the populace* of White Bear Lake and its environs *of having exhibited to them locally, during the current season* a number of 'first-run' productions which they would otherwise have had the opportunity to see. A further result was that this substantial number of films which would otherwise have moved in the channels of interstate commerce through the distributing offices at Minneapolis to White Bear Lake, was artfully blocked in its flow at Minneapolis.

"Strangling the competitive forces of the interstate market on 'first-run' films for White Bear Lake * * * *depriving the populace of White Bear Lake and environs of the privilege of seeing productions at the times and in the manner that they would have otherwise been exhibited to them*, if the competitive forces of the interstate market had not thus been improperly strangled; and artfully blocking at Minneapolis the flow of interstate commerce which * * * would otherwise have moved into White Bear Lake—these were all matters of sufficient general public interest to bring the situation within the operation of the Sherman Act.

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"In principle and within the intendment of the Sherman Act public interest is as much concerned

with the improper control of the interstate market on the buyer's or seller's side *for the little town* of White Bear Lake as for the great metropolis of New York City or for any State, or for the country as a whole." (Italics supplied.)

POINT III.

Divestiture of the ownership interests of the five majors in motion picture theatres should be decreed by this Court to preclude a recurrence of the monopolistic evils and accord realistic permanent protection to the rights of the general public under the First Amendment.

A.

The General Public's Affirmative Case for Divestiture.

The relief[25] granted by the Court below includes, *inter alia*, abolition by injunction of the various illegal trade practices as referred to under Point II hereof, and dissolution of defendants' ownership interests, jointly with one another or with any independent, in certain motion picture theatres.

Such relief, however, does not suffice to meet the necessities of the situation. No matter how efficacious it in the aggregate may be, every single feature of it is but an incidental auxiliary to a remedy designed to accord complete justice, but conspicuously lacking in the case at bar. That remedy is divestiture of the ownership interests of the Five Majors in motion picture theatres.

Unless such divestiture is decreed, it will not be possible realistically to recreate the conditions of free competition so as to assure to the public reasonable diversity in the production and the exhibition of motion pictures.

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25. 66 Fed. Supp. 323, 357-359.

With the decree as it now stands, the market place for the distribution and the exhibition of motion pictures is still substantially dominated by the Majors. The most important and the most lucrative segments of the exhibition market in particular are those where the Majors own and operate the finest and the largest first and subsequent-run theatres. Their first-run theatres alone represent 71% of all metropolitan first-run theatres throughout the United States. And these theatres alone yield at least 45% of the entire country's box-office receipts. Their owners, the Five Majors, as distributors, collect in excess of 70% of the total film rental derived from first-run theatres in the United States.[25a] Furthermore, their owners, the Five Majors, together with the Little Three, happen to constitute substantially the entire source of supply of motion pictures for the nation's moviegoers, estimated at more than 95,000,000 paid admissions per week.[26] With the exception of United Artists, the Big Eight are the nation's most opulent film producers. And all also constitute eight of the nation's eleven distributing organizations. As recognized in *Goldman Theatres Inc.* v. *Loew's, Inc. et al.*, 150 Fed. 2d 738, 744-745 (1945, C. C. A., 3rd):

> "• • • Defendants control the production and distribution of more than 80% of the feature pictures in the country, and no exhibitor can successfully operate without access to defendants' product."

In their present dominant position of towering financial strength and control in all branches of the motion picture industry, they would no more be disposed to open up the

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25a. Source: Vide footnote 15-a, p. 14, *supra*.

26. The Film Daily Year Book for 1945, page 47; Radio-Movies-Press, a brochure on the American Communicative Networks by Norman Woelfel of Bureau of Educational Research of Ohio State University, page 9.

choice and strategic affiliated theatres to independent film productions than they were before. And if independent film productions—the greatest maximum number possible—cannot be accorded access to these affiliated theatres, the general public, who contribute 70% of the entire country's first-run theatre box-office receipts and at least 45% of our country's box office receipts generally, directly to the Five Majors, will still remain deprived, in substantial measure, of the cultural and esthetic benefits of the widest selectivity possible in movie-fare.

Without independent producers in the film markets, it must follow that unaffiliated theatres will still remain helplessly dependent on the limited movie-fare of the producer-distributor-exhibitor defendants.[27] Since such unaffiliated theatres cannot exist without the films of the Big Eight, they will of necessity continue to be at their mercy. To expect these unaffiliated theatres to compete freely or to resist strongly any of the Majors in that kind of a film market is unrealistic. For, as was aptly remarked in *U. S. v. Motion Picture Patents Company*, 225 Fed. 800, 809 (E. D. Pa., 1915) appeal dismissed in 247 U. S. 524, "* * * It is too clear for comment that the mere

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27. It is of interest to note that in *Paramount Pictures, Inc. v. Langer*, 23 Fed. Supp. 890, 899 (1938, D. C. N. D.), reversed only for mootness in 306 U. S. 619, the United States District Court stated the following: "* * * a producer which owns theatres has the power to make it impossible for the independent exhibitor to procure films from it and difficult to procure them from other major producers in case the producer-exhibitor desires these films for itself. There is evidence tending to show that producers with affiliated theatres have exercised the powers possessed by them for their own advantage and to the detriment of their independent competitors." The *Langer* case was cited with approval in *Great Atlantic & Pacific Tea Co. v. Federal Trade Comm'n*, 106 F. 2d 667, 678 (September 1939, C. C. A. 3rd) cert. den. in 308 U. S. 694.

possession of the power here shown would make its assertion seldom necessary."

Moreover, under the existing conditions, large numbers of people who would be interested in building and operating new and attractive motion picture theatres in the various parts of the country, are discouraged from doing so. They cannot be assured of having access to the first-run films of the Majors. Nor can they hope to get a sufficient quantity of feature films of independent producers.

In other words, the traditional equitable remedy of divestiture should be decreed in order to eradicate realistically and permanently all the monopolistic evils existing in the motion picture industry. Once the Majors are divorced from their theatres—and not until then—various independent producers will be encouraged to produce more films for what will be an assured free competitive market. When this happens, there will undoubtedly be erected and opened many additional competing motion picture theatres to serve the public. And of necessity, the Majors will then be obliged to vie with independents in a salutary race to produce diversified films of higher qualitative stature, greater public appeal, and considerably augmented value as contributions to the moral, intellectual, and esthetic development of the nation's many millions of movie-goers.

B.

Analysis of Salient Features of Statutory Courts' Opinion on Divestiture.

(a) Quantitative Cold Brick and Mortar of the Five Majors' Theatres Are Outweighed in the Scales by Their Qualitative Significance and Economic Influence in the Motion Picture Industry.

In refusing to grant the remedy of divestiture, the lower Court stressed the superficial fact that the Five Majors own only 17.35%, or 3,137 of an aggregate of

18,076, motion picture theatres in the United States.[28] Clearly, here the grievous error of the lower Court was in failing to give greater weight and due regard to the qualitative, as distinguished from quantitative, significance of the Big Five's affiliated theatres.[29] The judges of the statutory court, it appears, attached more importance to cold brick and mortar than to such highly influential psychological and economic factors as the unusual size, the unique physical character, and the strategic location of such Majors' choice theatres—to say nothing of the extraordinary circumstance that these theatres alone yield more than 70% of the *first-run theatre* box-office receipts of the entire country. In this connection, the judges below apparently failed to evaluate properly the significance of the triune status of the Big Five as producers, distributors and exhibitors of motion pictures and the highly important fact that the Big Five and the Little Three constitute substantially the entire source of our country's motion pictures.

(b) The Historical Background of Defendants' Film Monopoly.

The court below committed another grievous error in finding that "there is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly * * *."[30] Here the Court below has disregarded important facts not only in the record at bar, but in the records of other motion picture cases relating to the monopolistic history of defendants. Adolph Zukor, for instance, and his organization, Famous Players Lasky Corporation, now known as Paramount Pictures, Inc., never even concealed

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28. 66 Fed. Supp. 323, 353.

29. Detailed discussion of the qualitative significance of the Big Five's affiliated theatres appears on pages 13 to 22, *supra*.

30. 66 Fed. Supp. 323, 354.

their monopolistic purpose in embarking upon a national theatre acquisition program in 1919.[31] Nor, for that matter, did any of the other corporate defendants and their founders. All the fair inferences from their activities in the film industry impel the conclusion that such corporate defendants were in fact maintained for the purpose of furthering and sustaining a national film monopoly.[32]

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31. In 1927, the Federal Trade Commission in 11 F.T.C. 187, 205 found Adolph Zukor and Famous Players Lasky Corporation guilty of furthering and possessing a monopoly. As the Federal Trade Commission said (p. 205): "It was the openly and publicly avowed purpose of said respondents by said policy of theatre ownership and operation, to dominate the entire motion picture industry * * *" Subsequently, when the Federal Trade Commission petitioned the United States Circuit Court of Appeals in the Second Circuit for an enforcement order (57 Fed. 2d 152 [1932], C. C. A., 2nd) the theatre acquisition issue was eliminated.

32. The history of monopolistic purposes and activities of defendants in combination with affiliates and other parties is reflected in the following cases: *Re: West Coast Theatres, Inc.*, (1929), 12 F.T.C. 436, 470, 476-77, 480-89 (Case No. 2); *Re: West Coast Theatres, Inc., et al.* (1929), 12 F.T.C. 383, 421-431 (Case No. 1); *Paramount Famous Lasky Corporation* v. *U. S.*, 282 U. S. 30; *U. S.* v. *First National Pictures, Inc.*, 280 U. S. 44; *U. S.* v. *West Coast Theatres, Inc.*, a criminal proceeding, No. 4902-M., Sept. 28, 1928, and an equity proceeding No. S.-10-C. Aug. 21, 1930, U. S. District Court, Southern District for California; *Youngclaus* v. *Omaha Film Board of Trade et al.*, 60 Fed. 2d 538, 539-540 (D. C. D. Neb., 1932); *Binderup* v. *Pathe Exchange et al.*, 263 U. S. 291; *U. S.* v. *Interstate Circuit Inc.*, 306 U. S. 208; *U. S.* v. *Crescent Amusement Co. et al.*, 323 U. S. 173; *Paramount Pictures Inc.* v. *Langer*, 23 Fed. Supp. 890 (1938, D. C. N. D.) reversed only for mootness in 306 U. S. 619; *William Goldman Theatres, Inc.* v. *Loew's Inc., et al.*, 150 Fed. 2d 738 (1945, C. C. A. 3rd); *Bigelow et al.* v. *RKO Radio Pictures, Inc. et al.*, 327 U. S. 251, 262-266.

(c) Rights of Private Property Vis-a-Vis Transcendental Public Welfare.

The statutory court fell into further error in concluding that "each defendant had a right to build and to own theatres and to exhibit pictures in them".[33] Such determination utterly ignores the overwhelming weight of the evidence demonstrating the qualitative significance of the Majors' strategically located first-run theatres as the bedrock for the maintenance of the dominant position of the Majors in all branches of the motion picture industry.[34] It by-passes the established fact that defendants have utilized their theatres as instrumentalities to exclude independent producers and new theatre operators from substantially the entire exhibition market to the great detriment of the interests of the general public.[35]

Generally speaking, the legal right of any person to acquire, own, and operate private property will be sustained by the courts. That right, however, is not supreme. It is subject to important exceptions in our jurisprudence. One of these exceptions is that "One cannot use his own property so as to injure the rights of others, nor can he use it in such a manner as to offend against public morality, health, or peace, and good order."[36] And this is all

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33. 66 Fed. Supp. 323, 354.

34. See discussion of qualitative significance of defendants' strategically situated first-run theatres at pages 13 to 22, *supra*.

35. See pages 13 to 22, *supra*, for discussion of effect of operation of defendants' theatres as limiting the constitutional rights of general public to maximum diversity in the production and the exhibition of motion pictures.

36. *People* v. *N. Y. Carbonic Acid Gas Co.*, 196 N. Y. 421, 440. Accord: Broom's Legal Maxims (10th Ed. 1939) P. 238; 58 C.J. 708; *The China* v. *Walsh*, 7 Wall. (U. S.) 53, 68; *The Marianna Flora*, 11 Wheat. (U. S.)

the more true where, as in the case at bar, the property is a public forum of the screen and directly relates to so important a medium of communications as the motion picture. As has been previously shown, its use has a strong influence on the moral, intellectual, and esthetic development of our country's millions of movie goers. It may even play a powerful part in preserving our democracy.

Besides, even if the acquisition, the ownership, and the operation of theatres by the Five Majors should be regarded as legal elements of the Majors' vast unlawful combination and monopoly in the motion picture industry, it is an established principle that the courts are empowered to enjoin the legal, as well as the illegal, segments of such entire evil combination and monopoly.

Thus, as succinctly stated in *U. S.* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 724:

> "* * * Equity has power to eradicate the evils of a condemned scheme *by prohibition of the use of admittedly valid parts of an invalid whole.*" (Emphasis ours.)

And as strongly emphasized by this tribunal in granting divestiture relief to plaintiff in *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173, 188 (1944):

1, 42; *Paramount Pictures, Inc.* v. *Langer*, 23 Fed. Supp. 890, 896 (1938, D. C. N. D.) reversed only for mootness in 306 U. S. 619. The juridical basis of this doctrine is variously expressed by other authorities. Thus, Broom's Legal Maxims, p. 1, states: "*Salus Populi Est Suprema Lex.* (XII Tables—Bacon, Max., reg. 12)—Regard for the public welfare is the highest law." Thus, Benjamin N. Cardozo, in The Nature of the Judicial Process (1921 Ed.), at page 66, declares: "The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence * * *."

"* * * The duty of the Court in these cases is 'to frame its decree so as to suppress the unlawful practices and to take such reasonable measures *as would preclude their revival*'." (Emphasis ours.)

In the case at bar, nothing short of complete divestiture of the Majors' ownership interests in motion picture theatres will constitute assurance of permanently precluding the resuscitation of the Majors' monopolistic evils.

Upon the record before this tribunal, legal niceties concerning private property rights should not be permitted to transcend considerations of general public welfare.

As pointedly promulgated in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 519:

"* * * *public interest* * * * *is more a favorite of the law* than is the promotion of private fortunes." (Emphasis ours.)

Nor should the seeming harshness of the remedy of divestiture or any inconvenience resulting therefrom to defendants be considered as a deterrent to decreeing such relief. Having enriched themselves very considerably over a period of many years as a consequence of the film monopoly which defendants furthered through the acquisition and the operation of their motion picture theatres, defendants are in no position to bar the separation of the good from the bad of their unlawful enterprises.

In *U. S.* v. *Crescent Amusement Co., et al.*, 323 U. S. 173, 189-190, this tribunal granted divestiture relief and said (PP. 189-190):

"* * * Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience. That principle is adequate here to justify divestiture * * * The proclivity in the

past to use that affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future.".

Besides, particularly in the light of the historical background of their monopolistic existence and operations,[37] defendants can no longer be expected to initiate and maintain permanently any required effective reforms for the recreation of freedom of trade and ideas in the marketplace. It is highly significant that whenever one of their evil illegal practices in the motion picture industry was eliminated, it was invariably done through the compulsion of judicial decree.[38] Accordingly, the towering financial stature and strength of defendants and their past proclivities to use their extraordinary economic powers to promote the ends of their monopoly, may not now be disregarded.[39]

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37 and 38. See cases on monopolistic history of defendants cited in footnotes 31 and 32 at page 27, *supra*.

39. Even during the very period of four years following the entry of the consent decree in 1938 in this action, and while such action was awaiting trial, the Theatre-Owning Majors were avariciously preoccupied with effectuating an unlawful conspiracy and discriminatory stratagem in withholding films from an independent motion picture theatre in Chicago. In *Bigelow et al.* v. *RKO Radio Pictures Inc. et al.*, 327 U. S. 251, 262-266, petitioners, the owners of the Jackson Park Motion Picture Theatre, complained that RKO, Loew's, Fox, Paramount, Vitagraph Warner Bros., and others, unlawfully conspired and discriminated against petitioners in withholding feature motion pictures for as long as ten weeks after they were exhibited by favored affiliated theatres in the Chicago District. This conspiracy and discrimination occurred in the period "(p. 254) from some date prior to November 1, 1936 to the date that suit was brought, July 28, 1942". It was claimed by petitioners that

As stated by Mr. Justice Benjamin N. Cardozo in *U. S. v. Swift & Co.*, 286 U. S. 106, 116-117:

> "* * * *size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past.*" (Emphasis ours.)

And as pronounced in *Paramount Pictures Inc. v. Langer*,[40] 23 Fed. Supp. 890, 900 (1938, D. C. N. D.), reversed only for mootness in 306 U. S. 619:

* * * * *

> "* * * * there is evidence in the record here which justifies an inference of suppression of local competition in states other than North Dakota by producers having affiliated theatres; and the evidence also discloses the existence of the power and the temptation of such producers to engage in practices promotive to monopoly and restraint of trade.

"(P. 254) in consequence they had been subjected to loss of earnings in excess of $120,000 during the five year period from July 27, 1937 to July 27, 1942." This Court found "(P. 256) There was evidence that respondent distributors and exhibitors conspired to give to the distributor-controlled or affiliated theatres preferential playing positions in the release system over the positions allotted to independent competing theatres including that of petitioners with the result that petitioners' theatre was unable to obtain feature films until the first week of 'general release' or ten weeks after the end of the Loop run." Accordingly, this Court sustained a verdict in favor of petitioners for treble damages amounting to $360,000.

40. The *Langer* case was cited with approval in *Great Atlantic & Pacific Tea Co. v. Federal Trade Com'n*, 106 Fed. 2d 667, 678 (September 1939, C. C. A. 3rd) cert. den. in 309 U. S. 694.

"It is our opinion that the existence of the unusual power to deal with competitors unfairly, when coupled with the opportunity and the temptation to use that power is probably a sufficient basis for legislative action to prevent the possibility of its exercise. This must certainly be so where there is, in addition, evidence of past aggressions."

(d) The Auction-Bidding System Is No Effective Substitute for Divestiture.

The auction bidding system for pictures and runs as prescribed in the decree of the statutory court[41] is no real effective substitute for divestiture. It is an intricate and cumbersome procedure which is not calculated to place the little independent theatre owner on a real equal competitive plane with the big independent theatre owner or any of the Five Theatre-Owning Majors.

To begin with, no provision is made for the requirement of a fixed ceiling price for each motion picture in accordance with established industry standards as regards the grade of such motion picture and its production cost. Without such a fixed price ceiling for each such picture, the result will be a frenzied race among exhibitors to outbid each other. Of necessity, the highest bid will be a price considerably out of proportion to the intrinsic value of the picture, and that price will most likely be passed on to the general public in the form of exorbitant prices of admission to theatres.

Whenever it suits their purpose, the Five Theatre-Owning Majors will always be in a strong position to outbid any competition of the independents. If the Five Majors incur any losses in the bidding process, they can easily recoup such losses at points where they enjoy mo-

41. 66 Fed. Supp. 323, 353-354.

nopoly and also by the simple expedient of marking up the price of pictures to independent exhibitors.

And, in the final analysis, the effect of the monopolistic ownership of the Five Majors will remain unchanged. Independent producers will still be excluded from the strategic theatres of the Five Majors and just as certainly from those in surrounding areas of any exhibitors who have been made dependent on these Five Majors as producers and distributors of films. In short, no system of auction bidding is capable of realistically recreating free competitive conditions *so that the general public can be assured of enjoying the widest possible diversity in the production and the exhibition of motion pictures.*

As has been demenstrated herein,[42] the most effective way of breaking all shackles of dictatorial restraint on the market price of motion pictures is by decreeing divestiture.

(e) Under Recreated Conditions of Free Competition the Strong Likelihood Is That the Independent Successors to the Ownership of the Majors' Theatres Will Give to the General Public Greater Service Than the Majors Ever Did at Any Time.

The statutory Court, however, doubts the ability of a new group of theatre owners to give the general public "as good service as the exhibitors they would have supplanted,"[43] in the event of divorcement.

This misgiving is an absolutely unfounded *non sequitur.* One of the basic tenets of our American social economy is that freedom of competition is the highest guarantee that those able to survive competition in the market place will furnish to the public satisfactory, if not the best, service and goods. This underlies the purpose of the Sher-

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42. See pages 22 to 26, *supra,* of this brief.

43. 66 Fed. Supp. 323, 353.

man Act.[44] In all Anti-Trust cases, the function of the Courts is to destroy unhesitatingly unlawful monopolies and to recreate conditions of free competition and diversity. The Courts may not speculate on the results which might ensue once the forces of competition are set free. They must assume that free competition, in the true American way of life, will operate for the ultimate welfare of the general public.

As aptly stressed by this tribunal in *Paramount Famous Lasky Corporation et al.* v. *U. S.*, 282 U. S. 30, 44:

> " * * * *The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intentions of parties, and it may be of some good results'.* * * " (Emphasis ours.)

Moreover, once the Majors are permanently divorced from their theatres, their independent successors, together with the remaining independent theatre owners, will be truly free to bid for films of independent producers. As a consequence of this, more and more independent producers will be encouraged to enter the exhibition mart without economic fear. And it is precisely the actual entry of more and more of such independent producers which will serve to maintain realistically free competitive conditions throughout the motion picture industry. Of necessity, such free competition will bring greater and greater diversity and qualitative content in the production and the exhibition of movie fare and wider selectivity to the general public. And of necessity it will in turn compel the Majors to produce and distribute better and more diversified films to survive such fair competition. If the

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44. 15 U. S. C. A. Sec. 1, *et seq.*, 26 Stat. at L. 209, Chap. 647 as amended.

successors to the ownership of the affiliated theatres bring about such salutary conditions as they—and not the Majors—are very likely to do, their service to the general public will be inestimable and will certainly surpass that of the Majors at any time.

Conclusion.

In view of all the foregoing considerations, and in the light of the record, the refusal of the statutory court to grant divestiture clearly constitutes an abuse of its judicial discretion. This equitable remedy is an efficacious complement to the auxiliary relief contained in such statutory court's decree. This alone, and no others, separately or combined, will truly serve to bring about a realistic recreation of diversity in filmfare and permanent protection to the rights of the general public under the First Amendment. It should, therefore, be granted in the interests of justice.

The appeals at bar should be disposed of by this tribunal accordingly.

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